

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 325 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

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KANTIBHAI D PATEL THROUGH PAH YOGESHKUMAR KANTILAL PATEL

Versus

A'BAD MUNICIPAL CORPORATION

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Appearance:

MR RF PATEL for Petitioners

MR PG DESAI for Respondent

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 07/10/97

ORAL JUDGEMENT

This is a revisional application under section 115 C.P.C. by the original plaintiff against order dated February 6, 1989 passed by the learned Judge, City Civil Court, Ahmedabad rejecting prayer of the petitioners to permit them to withdraw from suit with liberty to institute a fresh suit in respect of subject matter of

the suit and disposing of the suit filed by them as withdrawn.

2. The petitioners instituted Civil Suit no. 1670/82 in City Civil Court, Ahmedabad for declaration that notice issued by the respondent-Corporation under section 54 of the Bombay Town Planning Act, 1954 was null and void and for permanent injunction restraining the respondent from demolishing property occupied by the petitioners in pursuance of the notice issued under the provisions of the Bombay Town Planning Act, 1954. Along with the suit, the petitioners produced list of documents relied upon by them. Mark 3/1 was statutory notice dated February 24, 1982 allegedly served by the petitioners on the respondent. However, the petitioners had not produced any proof regarding service of notice on the respondent. On summons being served, the respondent contested suit by filing written statement and inter-alia contended that suit was liable to be dismissed for want of service of statutory notice. The petitioners, therefore, submitted an application at exh.76 and prayed the Court to permit them to withdraw from suit with liberty to institute a fresh suit in respect of subject matter of the suit, as suit was likely to fail by reason of formal defect, namely, non-service of statutory notice on the respondent. The learned Counsel for the Corporation made an endorsement on the application to the effect that he had no objection if suit was permitted to be withdrawn unconditionally.

3. The learned Judge by the impugned order has disposed of suit as withdrawn without granting liberty to the petitioners to institute a fresh suit in respect of subject matter of the suit, giving rise to present revision application.

4. Learned Counsel for the petitioners submitted that an application under Order-23 Rule 1(3) for permission to withdraw from suit with liberty to institute a fresh suit on the same subject matter, must be treated as an indivisible whole, and if a party is not allowed liberty to institute a fresh suit, his pending suit cannot be dismissed and, therefore, the impugned order having been passed without jurisdiction, deserves to be set aside.

5. Mr. P.G.Desai, learned Counsel appearing for the Corporation, pleaded that the suit was liable to be defeated for want of service of statutory notice and,

therefore, it cannot be said that any error is committed by the learned Judge in disposing of the suit as withdrawn without granting permission to the petitioner to file a fresh suit in respect of subject matter of the suit and, therefore, the revision application should be dismissed.

6. I am of the opinion that there is force in the contention raised by learned Counsel for the petitioners. Order-23 Rule-1 provides for withdrawal of suit or abandonment of part of claim and reads as under :-

"1. Withdrawal of suit or abandonment of part of claim:- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An Application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other, person.

(3) Where the Court is satisfied--

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff--

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule(1), or to withdraw, under sub-rule(3), any suit or part of a claim, without the consent of the other plaintiffs."

From the phraseology used in Order-23 Rule-(1) it becomes evident that sub-rule (1) of Rule 1 of Order-XXIII C.P.C. gives the plaintiff an option to withdraw a suit or abandon part of a claim. If a plaintiff merely desires to withdraw a suit, all he has to do is to make an application under sub-rule (1) of Rule-1 of Order-23 C.P.C. and seek permission to withdraw the suit. Under this sub-rule, the plaintiff may withdraw any part of the claim and there are no conditions attached to such withdrawal. Sub-rule (2) makes provision as to what should be accompanied with an application seeking leave of the Court to withdraw claim made on behalf of the plaintiff who is minor. Then comes sub-rule(3) which provides that if certain conditions are satisfied, the Court may grant the plaintiff permission to withdraw the suit or abandon part of the claim with liberty to bring a fresh suit in respect of the subject matter of the suit so withdrawn. Where the plaintiff applies under sub-rule(3), what he wants is that he should be permitted to withdraw the suit with permission to institute a fresh suit. Therefore, when an application is made under sub-rule (3), it is not open to the court to treat it as if it is an application under sub-rule (1) without any condition and to grant the prayer for withdrawal and refuse the prayer for permission to bring a fresh suit. The prayer under sub-rule (3) must be treated as one prayer and the Court may either reject the entire prayer or allow the entire prayer i.e. permit the withdrawal of the suit with liberty to bring a fresh suit. The reason is that if the court grants him the permission to withdraw but refuses the permission to institute a fresh suit, the result would be that the plaintiff would be deprived of carrying on with the suit as best as he can and would also not be permitted to file a fresh suit on the same cause of action. An application under Order 23(1) sub-rule(3) for permission to withdraw from suit with liberty to institute a fresh suit on the same subject matter must be treated as an indivisible whole and if a party is not

allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application should be dismissed altogether and the suit should be retained on the file. It was not the intention of the Legislature that the plaintiff should be put to this loss by breaking up the prayer for withdrawal with permission to file a fresh suit about the same subject matter into two parts.

7. In view of the above stated legal position, the learned Judge could not have disposed of suit filed by the petitioners as withdrawn without giving permission to the petitioners to file a fresh suit in respect of subject matter of the suit. The learned Judge while disposing of the suit as withdrawn has acted with material irregularity. If the order is allowed to stand, it would occasion a failure of justice and cause irreparable injury to the petitioner. The revision application, therefore, deserves to be accepted. The question then is whether I should now refuse the prayer entirely so that the plaintiff may go on with the suit as it is in the trial Court against the opponent or he should be given permission to withdraw the suit with liberty to file a fresh suit against the opponent. I must say that the plaintiff has not made out any case for permitting him to withdraw suit with liberty to file a fresh suit because copy of the notice served on the opponent is produced by him with list Exh.3. Under the circumstances, interest of justice would be served if prayer made in the application is entirely refused so that the plaintiff may go on with the suit as it is in the Trial Court against the opponent.

For the foregoing reasons, the revision application partly succeeds. The order dated February 6, 1989 passed by the learned Judge, 6th Court, City Civil Court, Ahmedabad below exh.76 in Civil Suit no. 1670/82 disposing of the suit as withdrawn is hereby quashed and set aside. Application Exh.76 stands dismissed. Civil Suit no.1670/82 is hereby restored on file. The learned Judge is directed to dispose of the suit according to law and on merits as early as possible and preferably before March 31, 1998. The status-quo in terms of Notice of Motion in the suit shall be maintained by the parties till hearing of the suit. Rule is made absolute accordingly, with no order as to costs.

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